

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 5:16-CR-94
	:	
BRIAN FOLKS	:	

**JOINT REPORT ON THE STATUS OF DISCOVERY  
THAT THE DEFENDANT MAY RETAIN**

As required by the Court in its July 6, 2018, Entry Order (Doc. 262), counsel for the Government and Defendant Brian Folks met on Friday July 13, 2018, and conferred regarding the discovery materials that Mr. Folks may retain while incarcerated. Counsel reviewed descriptions of all of the documentary materials produced by the Government to date (over 13,000 pages), and reached an agreement as to the proper designation (either “sensitive” or “non-sensitive”) of the vast majority of the materials. For example, the Government agreed that thousands of pages could be designated non-sensitive and, therefore, can be provided to the defendant for review in his cell. This includes agent reports related to the acquisition of evidence, surveillance, and other types of events that do not jeopardize witness safety in this case. The Government further agreed that by redacting some personal identifying information from other documents (bank records, for example), documents that were previously classified as “sensitive” can be made “non-sensitive” and therefore available for the defendant to review in his jail cell. The parties further agreed that numerous other documents, such as Grand Jury testimony, documents containing most types of photographs, and certain medical records, should be deemed “sensitive,” and thus must be reviewed subject to the current protective order.

However, the parties fundamentally disagree as to the remaining documents. The disputed documents identify the civilian witnesses who are expected to testify against the defendant in this case, and primarily include witness statements, reports containing witness statements, affidavits in support of search warrants summarizing witness statements, and *Giglio* material about those witnesses. Other disputed documents consist of sensitive law enforcement information that is not directly relevant to the pending charges (such as investigative files of unrelated cases).

The Government believes that all of the disputed items should be deemed sensitive, as they can be classified as Jencks or *Giglio* material, or because they contain sensitive law enforcement information. *See United States v. Moore*, 322 Fed. App'x 78, 83 (2d Cir. 2009); *United States v. Rivera*, 153 Fed. App'x 758, 760 (2d Cir. 2005). Accordingly, the Government requests that the Court only permit Mr. Folks to review the disputed documents pursuant to the parameters of the Amended Protective Order issued by this Court.

The defense position is that not every document containing a witness statement or criminal record is sensitive, and that the Government must make a “particularized showing of good cause with respect to any individual document.” *San Jose Mercury News, Inc. v. U.S. Dist. Court, Northern District (San Jose)*, 187 F.3d 1096, 1103 (9<sup>th</sup> Cir. 1999) (citations omitted). The defense also notes that the materials at issue do not include audio and video recordings, which amount to hours of material and which Mr. Folks is not permitted to retain in the facility in which he is being detained. As a result, all of this material must be reviewed in the presence of counsel, and is in addition to the thousands of pages that are currently characterized as sensitive under the Amended Protective Order.

Counsel for both parties estimate that the materials in dispute amount to between 2000-2500 pages of documents. The parties estimate that approximately 9000 pages are available for review by the defendant in his cell. The remaining documents were designated “sensitive,” and must be reviewed pursuant to the Amended Protective Order.

Counsel for the Government and Mr. Folks have identified those documents about which they cannot agree, and can provide a copy on disk of those documents to the Court for its review *in camera*. The parties agree that a hearing before the Court is necessary to resolve the parties’ disagreement, and request such a hearing as soon as practicable.

Dated at Burlington, Vermont this 18<sup>th</sup> day of July, 2018.

For the Government:

By: /s/ Abigail E. Averbach  
Abigail E. Averbach  
Assistant U.S. Attorney  
P.O. Box 570  
Burlington, VT 05402-0570  
(802) 951-6725  
abigail.e.averbach@usdoj.gov

By: /s/ Jared Fishman  
Jared Fishman  
Special Litigation Counsel  
Emily Savner  
Trial Attorney  
Civil Rights Division, Criminal Section  
U.S. Department of Justice  
601 D Street, NW, 5th Floor  
Washington, DC 20530  
Telephone: (202) 353-4081  
Jared.Fishman2@usdoj.gov

For Defendant Brian Folks:

By: /s/ Mark Kaplan  
Mark A. Kaplan, Esq.  
KAPLAN & KAPLAN  
95 St. Paul Street, Suite 405  
Burlington, Vermont 05402  
(802) 651-0013

By: /s/ Natasha Sen  
Natasha Sen  
Attorney  
P.O. Box 193  
Brandon, Vermont 05733  
(802) 825-6385

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA,

v.

BRIAN FOLKS,  
Defendant.

Crim. No. 5:16-CR-94-1

Certificate of Service

I certify that on July 18, 2018, I caused a copy of the *Joint Report on The Status of Discovery That the Defendant May Retain* to be sent to Natasha Sen and Mark Kaplan, counsel for Defendant, via ECF.

By: s/ Jared Fishman  
JARED FISHMAN  
Special Litigation Counsel  
Civil Rights Division, Criminal Section  
U.S. Department of Justice  
601 D Street, NW, 5th Floor  
Washington, DC 20530  
Telephone: (202) 598-1877  
Jared.Fishman2@usdoj.gov